

the strike or lockout is covered under USCIS regulation 8 CFR 214.2(h)(17), *Effect of a strike*, for “H” nonimmigrants, ETA must certify to USCIS, in the manner set forth in that regulation, that a strike or other labor dispute involving a work stoppage of nurses is in progress at the facility.

(c) *Lay off* of a U.S. nurse means that the employer has caused the nurse’s loss of employment in circumstances other than where—

(1) A U.S. nurse has been discharged for inadequate performance, violation of workplace rules, or other reasonable work-related cause;

(2) A U.S. nurse’s departure or retirement is voluntary (to be assessed in light of the totality of the circumstances, under established principles concerning “constructive discharge” of workers who are pressured to leave employment);

(3) The grant or contract under which the work performed by the U.S. nurse is required and funded has expired, and without such grant or contract the nurse would not continue to be employed because there is no alternative funding or need for the position; or

(4) A U.S. nurse who loses employment is offered, as an alternative to such loss, a similar employment opportunity with the same employer. The validity of the offer of a similar employment opportunity will be assessed in light of the following factors:

(i) The offer is a *bona fide* offer, rather than an offer designed to induce the U.S. nurse to refuse or an offer made with the expectation that the worker will refuse;

(ii) The offered job provides the U.S. nurse an opportunity similar to that provided in the job from which he/she is discharged, in terms such as a similar level of authority, discretion, and responsibility, a similar opportunity for advancement within the organization, and similar tenure and work scheduling;

(iii) The offered job provides the U.S. nurse equivalent or higher compensation and benefits to those provided in the job from which he/she is discharged.

(d) *Documentation*. The facility must include in its public access file, copies of all notices of strikes or other labor

disputes involving a work stoppage of nurses at the facility (submitted to ETA under paragraph (b) of this section). The facility must retain in its non-public files, and make available in the event of an enforcement action pursuant to subpart M of this part, any existing documentation with respect to the departure of each U.S. nurse who left his/her employment with the facility in the period from 90 days before until 90 days after the facility’s petition for H-1C nurse(s). The facility is also required to have a record of the terms of any offer of alternative employment to such a U.S. nurse and the nurse’s response to the offer (which may be a note to the file or other record of the nurse’s response), and to make such record available in the event of an enforcement action pursuant to subpart M.

[65 FR 51149, Aug. 22, 2000, as amended at 75 FR 10405, Mar. 5, 2010]

§ 655.1116 Element VI—What notification must facilities provide to registered nurses?

(a) The sixth attestation element requires the facility to attest that at the time of filing of the petition for registered nurses under section 101(a)(15)(H)(i)(c) of the INA, notice of filing has been provided by the facility to the bargaining representative of the registered nurses at the facility or, where there is no such bargaining representative, notice of the filing has been provided to registered nurses at the facility through posting in conspicuous locations, and individual copies of the Attestation have been provided to registered nurses employed at the facility.

(b) *Notification of bargaining representative*. (1) At a time no later than the date the attestation is transmitted to ETA, on ETA Form 9081, Attestation for H-1C Nonimmigrant Nurses, the facility must notify the bargaining representative (if any) for nurses at the facility that the attestation is being submitted. This notice may be either a copy of the attestation (ETA Form 9081) or a document stating that the attestations are available for review by interested parties at the facility (explaining how they can be inspected or obtained) and at the Office of Foreign

Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210. The notice must include the following statement: “Complaints alleging misrepresentation of material facts in the attestation or failure to comply with the terms of the attestation may be filed with any office of the Wage and Hour Division, United States Department of Labor.”

(2) No later than the date the facility transmits a petition for H-1C nurses to USCIS, the facility must notify the bargaining representative (if any) for nurses at the facility that the H-1C petition is being submitted. This notice may be either a copy of petition, or a document stating that the attestations and H-1C petition are available for review by interested parties at the facility (explaining how they can be inspected or obtained) and at the Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210. The notice must include the following statement: “Complaints alleging misrepresentation of material facts in the attestation or failure to comply with the terms of the attestation may be filed with any office of the Wage and Hour Division, United States Department of Labor.”

(c) *Posting notice.* If there is no bargaining representative for nurses at the facility, the facility must post a written notice in two or more conspicuous locations at the facility. Such notices shall be clearly visible and unobstructed while posted, and shall be posted in conspicuous places where nurses can easily read the notices on their way to or from their duties. Appropriate locations for posting hard copy notices include locations in the immediate proximity of mandatory Fair Labor Standards Act wage and hour notices and Occupational Safety and Health Act occupational safety and health notices. In the alternative, the facility may use electronic means it ordinarily uses to communicate with its nurses about job vacancies or promotion opportunities, including through its “home page” or “electronic

bulletin board,” provided that the nurses have, as a practical matter, direct access to those sites; or, where the nurses have individual e-mail accounts, the facility may use e-mail. This must be accomplished no later than the date when the facility transmits an Attestation to ETA and the date when the facility transmits an H-1C petition to the USCIS. The notice may be either a copy of the Attestation or petition, or a document stating that the Attestation or petition has been filed and is available for review by interested parties at the facility (explaining how these documents can be inspected or obtained) and at the national office of ETA. The notice shall include the following statement: “Complaints alleging misrepresentation of material facts in the Attestation or failure to comply with the terms of the Attestation may be filed with any office of the Wage and Hour Division of the United States Department of Labor.” Unless it is sent to an individual e-mail address, the Attestation notice shall remain posted during the validity period of the Attestation; the petition notice shall remain posted for ten days. Copies of all notices shall be available for examination in the facility’s public access file.

(d) *Individual notice to RNs.* In addition to notifying the bargaining representative or posting notice as described in paragraphs (b) and (c) of this section, the facility must provide a copy of the Attestation, within 30 days of the date of filing, to every registered nurse employed at the facility. This requirement may be satisfied by electronic means if an individual e-mail message, with the Attestation as an attachment, is sent to every RN at the facility. This notification includes not only the RNs employed by the facility, but also includes any RN who is providing service at the facility as an employee of another entity, such as a nursing contractor.

(e) Where RNs lack practical computer access, a hard copy must be posted in accordance with paragraph (c) of this section and a hard copy of the Attestation delivered, within 30 days of the date of filing, to every RN employed at the facility in accordance with paragraph (d) of this section.

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(f) The facility must maintain, in its public access file, copies of the notices required by this section. The facility must make such documentation available to the Administrator in the event of an enforcement action pursuant to subpart M of this part.

[65 FR 51149, Aug. 22, 2000, as amended at 75 FR 10405, Mar. 5, 2010]

§ 655.1117 Element VII—What are the limitations as to the number of H-1C nonimmigrants that a facility may employ?

(a) The seventh attestation element requires that the facility attest that it will not, at any time, employ a number of H-1C nurses that exceeds 33% of the total number of registered nurses employed by the facility. The calculation of the population of nurses for purposes of this attestation includes only nurses who have an employer-employee relationship with the facility (as defined in § 655.1102).

(b) The facility must maintain documentation (e.g., payroll records, copies of H-1C petitions) that demonstrates its compliance with this attestation. The facility must make such documentation available to the Administrator in the event of an enforcement action pursuant to subpart M of this part.

§ 655.1118 Element VIII—What are the limitations as to where the H-1C nonimmigrant may be employed?

The eighth attestation element requires that the facility attest that it will not authorize any H-1C nurse to perform services at any worksite not controlled by the facility or transfer any H-1C nurse from one worksite to another worksite, even if all of the worksites are controlled by the facility.

§ 655.1130 What criteria does the Department use to determine whether or not to certify an Attestation?

(a) An Attestation form which is complete and has no obvious inaccuracies will be accepted for filing by ETA without substantive review, *except that* ETA will conduct a substantive review on particular attestation elements in the following limited circumstances:

(1) Determination of whether the hospital submitting the Attestation is a qualifying “facility” (*see* § 655.1110(c)(ii), regarding the documentation required, and the process for review);

(2) Where the facility attests that it is taking or will take a “timely and significant step” other than those identified on the Form ETA 9081 (*see* § 655.1114(b)(2)(v), regarding the documentation required, and the process for review);

(3) Where the facility asserts that taking a second “timely and significant step” is unreasonable (*see* § 655.1114(c), regarding the documentation required, and the process for review).

(b) The certifying officer will act on the Attestation in a timely manner. If the officer does not contact the facility for information or make any determination within 30 days of receiving the Attestation, the Attestation shall be accepted for filing. If ETA receives information contesting the truth of the statements attested to or compliance with an Attestation prior to the determination to accept or reject the Attestation for filing, such information shall not be made part of ETA’s administrative record on the Attestation but shall be referred to the Administrator to be processed as a complaint pursuant to subpart M of this part if such Attestation is accepted by ETA for filing.

(c) When the facility submits the attestation to ETA and provides the notice required by § 655.1116, the attestation must be made available for public examination at the facility. When ETA accepts the attestation for filing, the attestation will be made available, upon request, for public examination in the Office of Foreign Labor Certification, Employment Training Administration, U.S. Department of Labor, Room C-4312, 200 Constitution Avenue, NW., Washington, DC 20210.

(d) *Standards for acceptance of Attestation.* ETA will accept the Attestation for filing under the following standards:

(1) The Attestation is complete and contains no obvious inaccuracies.

(2) The facility’s explanation and documentation are sufficient to satisfy the requirements for the Attestation